(23)

No. 96-1578

In The
# Supreme Court of The United States
October Term, 1997

HON. THOMAS R. PHILLIPS, *et al.*,
*Petitioners,*

v.

WASHINGTON LEGAL FOUNDATION, *et al.*,
*Respondents.*

On Writ Of Certiorari
To The United States Court of
Appeals For The Fifth Circuit

## BRIEF OF THE HONORABLE ROBERT E. TALTON *et al.*, AS INDIVIDUAL MEMBERS OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF TEXAS, AS AMICI CURIAE SUPPORTING RESPONDENTS

MARK W. SMITH
STEVEN B. EICHEL
919 Third Avenue
New York, NY 10022
(212) 735-2006

STEPHEN R. MCALLISTER*
University of Kansas School of Law
Green Hall
Lawrence, KS 66045
(785) 864-4550

*Counsel of Record

*Counsel for Amici Curiae*

APPELLATE ADVANTAGE
3723 N. OAK TRAFFICWAY ◆ KANSAS CITY, MO 64116 ◆ 816-453-2424



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## INTEREST OF THE *AMICI*

*Amici curiae* Robert E. Talton, Kent Grusendorf, Bob Hunter, John Shields, Terry Keel, Arlene Wohlgemuth, Mary Denny, Talmadge L. Heflin, Jim Horn, Eugene J. Seaman, Ted Kamel, and Gary Elkins serve as duly-elected members of the House of Representatives for the State of Texas.[1]

As members of the Texas House of Representatives, these *amici* have a direct interest in (i) ensuring that statutes enacted by the Texas Legislature are not ignored or violated by any person, entity, or governmental branch, including the Supreme Court of Texas, (ii) protecting their policy-making authority and legislative function from intrusions by the Texas Supreme Court, and (iii) preserving the sanctity of private property rights. Although *amici* believe that helping the indigent receive appropriate legal assistance is an important public policy goal, achieving this policy goal is entrusted by the Texas Constitution to the state legislature --

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[1] Pursuant to Rule 37.6 of this Court, counsel for *amici* certify that counsel for the respondents did not author any part of this brief, and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief. Sup. Ct. R. 37.6. As a courtesy, prior to filing the brief, counsel for *amici* did send a draft copy of the brief to respondents' counsel.

The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk.



an institution with superior policy-making capabilities -- not the Texas Supreme Court.

## STATEMENT OF THE CASE

*Amici* adopt the statement of the case set forth in Respondents' brief.

## SUMMARY OF ARGUMENT

By order of the Supreme Court of Texas, dated December 13, 1988, the Texas State Bar Rules were amended to make the voluntary Texas Interest on Lawyers Trust Accounts ("IOLTA") program mandatory. In order to amend the Texas State Bar Rules, the Texas Supreme Court was obligated to comply with § 81.024 of Texas' Government Code. Section 81.024 of Texas' Government Code requires that (i) the registered members of the State Bar be permitted to vote on all proposed Bar Rules and (ii) at least 51 percent of the registered members of the State Bar actually vote on the proposed Bar Rule. See Tex. Gov't Code Ann. § 81.024 (West 1988). Unless these two conditions are satisfied, a proposed Bar Rule may not be promulgated by the Texas Supreme Court. See Tex. Gov't Code Ann. § 81.024(g) (West 1988). Here, in mandating participation in the IOLTA program, the Texas Supreme

Court amended the Bar Rules without complying with a duly enacted, clearly applicable state statute.

Besides failing to comply with § 81.024, the Texas Supreme Court exceeded its authority when it redirected the interest income generated in IOLTA accounts to the Texas Equal Access to Justice Foundation ("TEAJF") for distribution to various legal service organizations. By taking the IOLTA interest income from those clients whose funds generated the interest, the Texas Supreme Court imposed, in effect, a 100% tax on the net income generated by each client's principal. These *de facto* tax revenues would then be given to TEAJF, acting as a state agent, for distribution to organizations that it deemed worthy of public subsidies. In creating this arrangement, the Supreme Court exceeded its authority because the Texas Constitution authorizes only the legislature -- not the judiciary -- to implement tax and spend policy.

In addition to this constitutional imperative, the Texas State Legislature is better suited than the Texas Supreme Court to establish tax and spend policies because the Legislature has substantial latitude to accommodate competing concerns and to account for the practical ability of the state to resolve the issue at hand. The Texas Legislature is authorized and deemed competent to determine Texas' taxing and spending policy, including determining how revenue should be raised and spent to



provide basic legal services for the indigent in Texas. In fact, in fulfillment of this role, the Texas Legislature earlier this year amended chapter 51 of the Government Code to increase court filing fees in order to raise revenue to provide the indigent in Texas with legal representation. By enacting this legislation, the Texas Legislature exercised its state constitutional authority to determine the manner in which revenue will be raised and utilized on behalf of Texas' indigent. Moreover, the vast majority of legal services for Texas' indigent have been provided through voluntary *pro bono* services rather than through legal services paid for by the IOLTA program. In fact, the IOLTA program constitutes a relatively insignificant proportion of the free legal services available to Texas' indigent.

## ARGUMENT

### I. THE TEXAS SUPREME COURT DISREGARDED TEXAS STATUTORY REQUIREMENTS WHEN IT AMENDED THE TEXAS BAR RULES TO MANDATE LAWYER PARTICIPATION IN THE IOLTA PROGRAM

In 1988, the Texas IOLTA program became mandatory after the Texas Supreme Court amended the Texas Bar Rules in disregard of statutorily-required amendment procedures.

The Texas State Legislature enacted § 81.024 of Texas' Government Code, effective September 1, 1987, to establish requirements by which the Texas Supreme Court was permitted to amend the Texas Bar Rules. See Tex. Gov't Code Ann. § 81.024 (West 1988). Under this statute, before a proposed Bar Rule may become effective, the Texas Supreme Court is obligated to comply with the following procedures:

(a) The supreme court shall promulgate the rules governing the State Bar. The rules may be amended as provided by this section.

(b) The supreme court may, either as it considers necessary, pursuant to a resolution of the board of directors of the State Bar, or pursuant to a petition signed by at least 10 percent of the registered members of the State Bar, prepare, propose, and adopt rules or amendments to rules for the operation, maintenance, and conduct of the State Bar and the discipline of its members.

(c) When the supreme court has prepared and proposed rules or amendments to



rules under this section, the court shall mail a copy of each proposed rule or amendment in ballot form to each registered member of the State Bar for a vote.

(d) At the end of the 30-day period following the date the ballots are mailed, the court shall count the returned ballots. An election is valid only if at least 51 percent of the registered members of the State Bar vote in the election.

(e) The supreme court shall promulgate each rule and amendment that receives a majority of the votes cast in an election. The rule or amendment takes effect immediately on promulgation by the court.

(f) The vote shall be open to inspection by any member of the bar or the public.

(g) A rule may not be promulgated unless it has been approved by the

> members of the State Bar in the manner provided by this section.

See Tex. Gov't Code Ann. § 81.024 (West 1988) (emphasis added). Under § 81.024, the Texas Supreme Court may promulgate rules governing the Texas State Bar only if it acts in accordance with the statutory procedures. See id.

Here, although the IOLTA program has existed since 1984, the program did not become mandatory until December 13, 1988, when the Texas Supreme Court issued an order making the program obligatory (the "IOLTA Order"). See Harold F. Kleinman & Dean W. Frank Newton, Court Orders IOLTA Conversion: An Overview of the Program, 52 Tex. Bar J. 172 (Feb. 1989); Texas Supreme Court, Order of December 13, 1988, reprinted in 52 Tex. Bar J. 173 (Feb. 1989). In issuing the IOLTA Order, the Texas Supreme Court wrote that it was acting solely "pursuant to the authority conferred on the Supreme Court by [the] Texas Constitution, Article V, § 31 and Texas Government Code § 81.011, as well as the inherent powers of this Court to regulate the practice of law." Texas Supreme Court, Order of December 13, 1988, reprinted in 52 Tex. Bar J. 173 (Feb. 1989). Conspicuously absent from the IOLTA Order was any reference to § 81.024, with which the court failed to comply in numerous respects.



Before the Bar Rules could be amended to make the IOLTA program mandatory, § 81.024 required the Texas Supreme Court to mail a copy of the proposed change to every registered member of the State Bar for a vote. See Tex. Gov't Code Ann. § 81.024(c) (West 1988). The Texas Supreme Court did not do so. Section 81.024 required the Texas Supreme Court to conduct a vote on the proposed change among the members of the State Bar. See Tex. Gov't Code Ann. § 81.024(c) & (d) (West 1988). The Texas Supreme Court did not allow a vote. Section 81.024 required that at least fifty-one percent of the registered members of the State Bar vote on the proposed rule before it could become effective. See Tex. Gov't Code Ann. § 81.024(d) (West 1988). Because the Texas Supreme Court did not put the proposed rule to a vote, fifty-one percent of the State Bar did not vote on the proposal to compel participation in IOLTA. Indeed, only nine members of the Texas State Bar were permitted to vote on the proposed rule -- that is, only those nine members of the Texas State Bar who also sat as members of the Texas Supreme Court were given the opportunity to vote on whether to mandate participation in IOLTA. In sum, the Texas Supreme Court issued the IOLTA Order in contravention of § 81.024, a

state statute enacted by the duly-elected representatives of the residents of the State of Texas.[2]

Insofar as *amici* are aware, since the enactment of § 81.024 of Texas' Government Code, effective September 1, 1987, the members of the Texas State Bar have had the opportunity to vote on every proposed amendment to the Texas Bar Rules except the IOLTA Order.

*Amici* recognize that the Texas Supreme Court's disregard of the plain requirements of a properly enacted state statute may not provide grounds for this Court to decide the constitutional questions presented in this case. Nevertheless, the Texas Supreme Court's decision to ignore the unambiguous procedures set forth in § 81.024 raises

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[2] Ironically, the Texas Supreme Court's decision to ignore § 81.024 is inconsistent with a statement it made only months after mandating IOLTA participation. In a public proclamation welcoming comments about a proposal to adopt new disciplinary rules for the State Bar, the Texas Supreme Court stated "[t]he Supreme Court recognizes that it is important that all interested persons have fair opportunity to comment upon proposed changes before they are made." Texas Supreme Court Invites Comments on Proposed Amendments to Texas Court Rules, 52 Tex. Bar J. 1147 (Nov. 1989). Nevertheless, in responding to subsequent criticism by members of the bar for issuing the IOLTA Order without first putting the proposal to a vote of the State Bar, Texas Supreme Court Justice Raul Gonzalez explained, "'[t]he court felt that any further comment would not be beneficial in weighing the interest of the [mandatory IOLTA program].'" State Bar Board Meets in Galveston; Model Rules Referendum Scheduled, 52 Tex. Bar J. 320 (Mar. 1989) (emphasis added).



concern about why the court decided to unilaterally promulgate the IOLTA Order instead of giving members of the Texas State Bar an opportunity to exercise their statutory right to vote on the proposed rule change. The Texas Supreme Court's disregard of § 81.024 seems inconsistent with its general view that Texas courts may not ignore the "Legislature's unequivocal expression of intent" when such intent can be readily discerned from the language of a statute. See Trammell Crow Co. No. 60 v. Harkinson, 944 S.W.2d 631, 635 (Tex. 1997).

By depriving the individual members of the Texas State Bar the opportunity to exercise their statutory right to vote on the proposal to make the IOLTA program obligatory, the Texas Supreme Court placed its own policy preference above all others. In doing so, the Texas Supreme Court ignored the clear command of the Texas Legislature to allow members of the Texas State Bar to vote on proposed Bar Rule amendments before their promulgation.

## II. THE TEXAS SUPREME COURT EXCEEDED ITS AUTHORITY WHEN IT REDIRECTED THE INTEREST INCOME GENERATED BY IOLTA ACCOUNTS TO THE TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION

### A. The Texas Supreme Court Lacks The Authority To Implement Tax And Spend Policies

The Texas Constitution expressly provides for the separation of legislative and judicial functions:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

Tex. Const. art. II, § 1. In providing for the separation of powers, the Texas Constitution recognizes that each of the



"three distinct departments" acts under a delegated and limited authority such that if one branch exceeds its authority by exercising powers not belonging to it, these acts are a nullity and are not binding. See Tex. Const. art. II, § 1 (Notes of Decisions, Infringement of Powers) (West 1997).

The separation of powers provision of the Texas Constitution is violated when "one branch of government assumes, or is delegated, to whatever degree, a power that is more `properly attached' to another branch" or "when one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers." Armadillo Bail Bonds v. Texas, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990) (en banc). Under the Texas Constitution, the authority to prescribe taxes rests with the duly-elected Legislature. See, e.g., Tex. Const. art. VIII, §§ 1, 24; Isbell v. Gulf Union Oil Co., 147 Tex. 6, 11, 209 S.W.2d 762, 765 (1948) ("power to prescribe taxes . . . rests with the Legislature"); Texas v. Wynne, 134 Tex. 455, 468, 133 S.W.2d 951, 958 (1939) ("[t]he burden of levying taxes rests on the Legislature, and that body has plenary power of prescribing the mode of taxation to raise revenue"), appeal dismissed, 310 U.S. 610 (1940) (per curiam). The judiciary may not interfere with the Legislature's authority unless a proposed law violates the Texas or United States Constitution. See Isbell, 147 Tex. at 11, 209 S.W.2d at 765 (Texas State Constitution);

Vinmar, Inc. v. Harris County Appraisal District, 947 S.W.2d 554 (Tex. 1997) (United States Constitution). Here, however, the Texas Supreme Court infringed upon the Legislature's taxing and spending authority.

Under the mandatory IOLTA program, attorneys are required under certain circumstances[3] to deposit client funds in IOLTA accounts. The IOLTA funds are pooled and the interest earned on these funds is distributed by the TEAJF to various non-profit organizations which apply to the TEAJF for funding. See Washington Legal Found. v. Texas Equal Access to Justice Foundation, 94 F.3d 996, 998-99 (5th Cir. 1996), cert. granted, 117 S. Ct. 2535 (1997).

By redirecting IOLTA interest income from the clients whose funds generate the interest to TEAJF for disbursement, the Texas Supreme Court is imposing, in effect, a 100% tax on the net income generated by the clients' principal.[4] In making IOLTA obligatory, the Texas Supreme Court acted in contravention of the democratic process and infringed upon the Texas Legislature's taxing authority. Cf. Missouri v. Jenkins, 495 U.S. 33, 51 (1990) ("In assuming for itself the fundamental and delicate power of taxation the District Court not only intruded on local authority but circumvented it altogether.")

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[3] The mandatory IOLTA rules provide, in pertinent part, that:

> An attorney . . . receiving in the course of the practice of law . . . client funds that are nominal in amount or are reasonably anticipated to be held for a short period of time, shall establish and maintain a separate interest-bearing demand account at a financial institution and shall deposit in the account all those client funds.

Tex. Gov't Code Ann., tit. 2, subtit. G app. (West Supp. 1997) (State Bar Rules art. XI, § 5(A)).



The Texas Constitution grants the Texas Legislature -- not the judiciary -- the authority to enact and implement tax and spend policies. See Isbell, 147 Tex. at 11, 209 S.W.2d at 765 ("power to prescribe taxes . . . rests with the Legislature"); Tex. Const. art. VIII, § 6; see, e.g., Bullock v. Calvert, 480 S.W.2d 367, 370 (Tex. 1972) (holding that it lies within the discretion and power of the Legislature to appropriate state funds for the purpose of financing party primary elections). The Texas state judiciary may not establish a program that violates the Texas Constitution. See State Bar of Texas v. Gomez, 891 S.W.2d 243, 250 (Tex. 1994) (Hightower, Gammage, Spector, JJ., dissenting) ("[w]e have no inherent power to create a system

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[4] As respondents persuasively argue in their merits brief, under Texas state law, the interest on the deposit of principal is the property of the owner of that principal. Sellers v. County of Harris, 483 S.W.2d 242, 243 (Tex. 1972) (holding that "[t]he interest earned by deposit of money owned by the parties to the lawsuit is an increment that accrues to that money and to its owners").

that violates the Constitution"); Reese v. Texas, 772 S.W.2d 288, 290 (Tex. App.--Waco 1989, pet. ref'd) (per curiam) (reasoning that a court may not enact a procedural rule that conflicts with a provision of the Constitution); Picard v. Texas, 631 S.W.2d 761, 763 (Tex. App.--Beaumont 1981, no writ) (holding that the rule-making authority of any court may not conflict with constitutional provisions and that any unconstitutional rule is inoperative). Nevertheless, the effect of the mandatory IOLTA program is to impose a *de facto* 100% net income tax on the interest generated on clients' money involuntarily deposited into an IOLTA account. By the imposition of the *de facto* tax and the redirection of that interest to the TEAJF, the Texas Supreme Court exceeded its authority under the Texas Constitution by implementing a tax and spend policy.

### B. The Texas Supreme Court Is Not The Best Governmental Institution To Establish Tax And Spend Policies For The State Of Texas

The duties and responsibilities of the legislative and judicial branches of the Texas state government are based not only upon state law but also on institutional considerations. In contrast to the Texas Supreme Court, which is designed as an institution to resolve discrete disputes between parties, the Texas Legislature is the governmental



institution most competent to make tax and spend policies such as determining how revenue should be raised and spent to provide basic legal services for the indigent in Texas. Unlike courts, legislatures have substantial latitude to accommodate competing concerns and account for limitations on the practical ability of the state to resolve social issues. See Washington v. Glucksberg, 117 S. Ct. 2258, 2293 (1997) (Souter, J., concurring) ("Legislatures . . . have superior opportunities to obtain the facts necessary for a judgment about [assisted suicide]. Not only do they have more flexible mechanisms for fact finding than the Judiciary, but their mechanisms include the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions.").

Members of the Texas Supreme Court have previously recognized the limited public policy-making capabilities of the judiciary in a context remarkably similar to the mandatory IOLTA program. In State Bar of Texas v. Gomez, indigents brought an action for declaratory and injunctive relief to require the Texas State Bar or the Texas Supreme Court to implement a mandatory *pro bono* program for Texas lawyers. Although the indigents' action did not present a justiciable controversy and, therefore, the case was dismissed because the district court lacked jurisdiction, Justice Gonzalez in concurrence eloquently noted the impropriety of the court making public policy decisions:

> Mandating any program for legal services to the poor is a political question, over which this Court in its administrative capacity and the Legislature would have jurisdiction. However, in my opinion, any attempt to draft and implement such a program would unnecessarily divert the Court from its primary business of adjudicating disputes. The Legislature is better suited to undertake the activities necessary for drafting and implementing a program to provide indigent legal services. Different program options, as well as their legal and constitutional ramifications, will need to be considered. Since the problem of access to legal services faces society as a whole, the burden of resolving it does not solely rest on the legal profession.

891 S.W.2d at 247 (Gonzalez, J., concurring) (emphasis added). Likewise, this Court has repeatedly stated that the legislature is better suited to make policy decisions than the judiciary and that the role of the judiciary is to interpret the intent of the legislature rather than to make public policy. See, e.g., Washington, 117 S. Ct. at 2293 (Souter, J., concurring) ("We therefore have a clear question about which institution, a legislature or a court, is relatively more competent to deal with an emerging issue as to which facts



currently unknown could be dispositive. The answer has to be, for the reasons already stated, that the legislative process is to be preferred."); Missouri v. Jenkins, 515 U.S. 70, 132 (1995) (Thomas, J., concurring) ("Federal courts simply cannot gather sufficient information to render an effective decree, have limited resources to induce compliance, and cannot seek political and public support for their remedies.").

The Texas Supreme Court, as a government institution, is considerably less competent than the Texas Legislature to gather the information necessary to address the multitude of competing political and social interests being weighed in the enactment and implementation of tax and spend policies -- including how best to address the needs of indigents requiring legal assistance. Accordingly, the Texas Legislature, not the Texas Supreme Court, is the proper branch of government to determine for Texas the manner in which revenue should be generated and how such revenue should be spent subsidizing legal services to Texas' indigent.

### C. The Texas Bar And The Texas Legislature Already Provide For The Legal Needs Of Texas' Indigent

In characterizing the respondents' arguments against the IOLTA program as a means to preclude the provision of

legal services to the poor, (Brief for Petitioners on Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at 10-11 (Aug. 25, 1997)), petitioners exaggerate reality in an attempt to engender sympathy for this unconstitutional IOLTA program.

Like most lawyers, lawyers in Texas donate significant amounts of their time to providing free legal services for individuals who could not otherwise afford legal representation. The Texas Bar has conducted studies on the number of hours Texas lawyers donate to *pro bono* every year. In 1992, the first year the number of hours Texas lawyers billed to *pro bono* was reported, approximately eighty-nine percent (89%) of all legal services for the indigent were provided through voluntary *pro bono* services.[5] Between 1992 and 1996 (the last year for which figures are available), the total number of hours donated by Texas lawyers to *pro bono* work increased from approximately 1,338,900 to 1,679,050 hours a year. Id.

In contrast, the amount of legal services the IOLTA program has been capable of providing has been falling. In 1990, the IOLTA program generated approximately $9.3

[5] State Bar of Texas, Department of Research and Analysis, *Pro Bono* Reporting, June 1995 through May 1996, at 3; Texas Equal Access to Justice Foundation, Justice For All, 1992/1993 Annual Report.



million in interest revenue. In 1993, the IOLTA program generated only approximately $5.1 million. This substantial decrease in the amount of interest revenue generated by the IOLTA program resulted from falling interest rates. Robert Elder & Janet Elliot, Bar Wants $10 for Legal Services, Tx. Law., March 1, 1993, at 10.

To better compare the amount of legal services the IOLTA program has subsidized with the amount of legal services provided by Texas lawyers performing *pro bono* work, one need only divide the respective figures by the standard hourly billing rate that the typical Texas lawyer billed during the relevant time periods. According to one survey, the standard hourly billing rate for the typical Texas lawyer was $140.[6] Under the assumption that the typical Texas lawyer billed at $140 per hour, the number of hours of legal services the IOLTA program would have been able to subsidize in 1990 would have been approximately 66,429 hours.[7] Under this same assumption, the number of hours

[6] See,Charles Silver, Does Insurance Defense Counsel Represent the Company or the Insured?, 72 Tex. L. Rev. 1583, 1597 n. 72 (1994) (citing State Bar of Texas, 1992 Attorney Billing and Compensation Survey: Hourly Rate Report 13 (1992)). While the $140 per hour rate was used for the analysis set forth in this section of the brief, it is probable that the standard hourly rate for most Texas lawyers was lower in the years preceding 1992 and higher in the years after 1992.

[7] The $9.3 million in IOLTA interest revenue divided by the $140 per hour billing rate equals approximately 66,429 attorney *pro bono* hours.

of legal services the IOLTA program would have been able to subsidize in 1994 would have been approximately 36,429 hours.[8] By comparing the 1,338,900 hours donated by Texas lawyers in *pro bono* services during 1996 with the 66,429 hours subsidized by IOLTA in 1990 or the 36,429 hours subsidized by IOLTA in 1993, it appears that in addition to being unconstitutional, the IOLTA program constitutes a relatively insignificant proportion of the free legal services available for Texas' indigent.

Moreover, unlike the Texas Supreme Court, the Texas Legislature has the authority to prescribe taxes to raise the monies necessary to run the state government -- and it has done so. In fact, earlier this year, the Texas Legislature amended chapter 51 of the Government Code to add an additional court filing fee to raise monies to provide basic legal services for Texas' indigent. Act effective Sept. 1, 1997, 1997 Tex. Gen. Laws 699 (to be codified at Tex. Gov't Code Ann. § 51.901). By enacting this provision, the Texas Legislature exercised its authority to determine the state's tax and spend policy by determining the manner in which the revenue will be generated and utilized. Accordingly, there is no need for the Texas Supreme Court to implement its own tax and spend policies in the form of mandatory IOLTA or otherwise.

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[8] The $5.1 million in IOLTA interest revenue divided by the $140 per hour billing rate equals approximately 36,429 attorney *pro bono* hours.



## CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed and the Texas IOLTA program should be declared unconstitutional.

Respectfully submitted,

MARK W. SMITH
STEVEN B. EICHEL
919 Third Avenue
New York, NY 10022
(212) 735-2006

STEPHEN R. MCALLISTER*
University of Kansas
School of Law
Green Hall
Lawrence, KS 66045
(913) 864-9236

**Counsel of Record*

October 10, 1997

*Counsel for Amici Curiae*